

DOL Increases Risk of Joint Employer Liability for PE Firms With Their Portfolio Companies

PENpoints

A new subjective and not well-defined test for determining joint employer status could lead to less predictable results in cases seeking to impose portfolio company wage liability on a private equity firm.

The U.S. Department of Labor (“DOL”) recently expanded its interpretation of what constitutes a “joint employer” for wage and hour matters, increasing the chance that a private equity firm in some circumstances could be exposed to joint employer liability for wage violations by a portfolio company.

Background

One legal entity can be held jointly and severally liable for the unpaid wages (and sometimes other employment liabilities) of an otherwise separate entity when those entities are deemed to be “joint employers.” Under longstanding common law principles developed over decades, a private equity firm typically is not a joint employer with a portfolio company unless the private equity firm’s employees or representatives become directly involved in the portfolio company’s day-to-day operations, particularly with respect to decisions affecting portfolio company employees.

New DOL Guidance

According to recent DOL guidance, a joint employer relationship exists when workers have an employment relationship with one primary employer — such as a portfolio company — yet “the economic realities show that [workers are] economically dependent on, and thus employed by, another entity involved in the work.” This “economic realities” test represents a potentially expansive departure from previous common law tests applied by most agencies and courts (including DOL), which focused mainly on the amount of control actually exercised by one separate legal entity over the other (or the other’s workforce). The new test is subjective and not well-defined, and as a result could lead to less-predictable results if regulatory agencies and courts adopt a “facts and circumstances” approach to “joint employer” cases.

Joint Employer Factors

The extent to which a private equity firm regularly exerts actual direction and control over employment conditions at a portfolio company will remain the most important factor in the analysis, but the absence of significant control may no longer be determinative. Instead, DOL says that “any formulation must address the ‘ultimate inquiry’ of economic dependence.” Additional factors DOL could consider might include:

- A private equity firm’s control of a portfolio company’s Board of Directors (a mere “potential for control” that would not support joint employer arguments under current law).
- A private equity firm’s control over a single employment-related decision that adversely affects portfolio company employees (e.g., plant closings, layoffs, work relocation, restructuring).
- An indefinite, permanent, full-time, or long-term relationship between a private equity firm and a portfolio company employee (e.g., the use of the same turnaround executive in multiple portfolio companies).

An “economic realities” test opens the door for such creative arguments, as federal and state enforcement agencies and courts will be urged by the plaintiffs’ bar to follow DOL’s lead in seeking deeper financial pockets to satisfy wage and other employee liabilities.

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DOL has raised these stakes further by announcing its 2016 implementation of a new minimum salary threshold that overtime exempt employees must be paid in order to retain their exempt status under the Fair Labor Standards Act. The new minimum

(\$47,476), which takes effect December 1, 2016, more than doubles the previous minimum and requires all U.S. businesses to begin their planning efforts now to ensure compliance. See our [Kirkland Alert dated June 21, 2016](#), for more information.

If you have any questions about the matters addressed in this *KirklandPEN*, please contact the following Kirkland authors or your regular Kirkland contact.

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PENbriefs

OFAC Issues New Iran Guidance

The U.S. Department of Treasury Office of Foreign Assets Control (OFAC) issued new guidance in the form of FAQs on the scope of recent Iran sanctions relief. While the FAQs provide helpful guidance for U.S. companies, many questions remain unanswered, and the decision to permit an owned or controlled foreign entity to engage in Iran-related business remains, in essence, an enterprise risk management decision. To learn more, see our recent [Alert](#).

PENnotes

PLI 17th Annual Private Equity Forum
New York, New York
June 29-30, 2016

This annual event is designed to provide an understanding of the business and legal issues related to private equity investment, including recent regulatory and enforcement developments, compliance programs and ethical issues. Kirkland partner Andrew Wright will speak on “How to Market Private Equity Funds on a Global Basis.” Click [here](#) for more information.

PLI Understanding the Securities Laws 2016
Chicago, Illinois
September 28-29, 2016

This program will provide an overview and discussion of the basic aspects of the U.S. federal securities laws by in-house and law firm practitioners as well as SEC staff. Emphasis will be placed on the interplay among the Securities Act of 1933, the Securities Exchange Act of 1934, the Sarbanes-Oxley Act, the Dodd-Frank Act, the JOBS Act, the securities related provisions of the FAST Act and related SEC regulations. Kirkland partner Ted Peto will speak on “Regulation of Proxy Solicitations.” Click [here](#) for more information.

PLI Hot Topics in Mergers & Acquisitions 2016
Chicago, Illinois
September 30, 2016
New York, New York
October 13, 2016

An expert faculty of lawyers, general counsel, regulators and investment bankers will explore the state of M&A and trends for the year ahead. Kirkland partners Scott Falk and Sarkis Jebejian are co-chairs of the event and partner Nicole Greenblatt will be a panelist on “Distressed M&A.” Click [here](#) for more information.

Securities Enforcement Forum 2016
Washington, D.C.
October 13, 2016

This one-day conference brings together current and former senior SEC and DOJ officials, securities enforcement and white collar attorneys, in-house counsel and compliance executives to discuss the most important issues currently facing attorneys and professionals in the SEC enforcement area. Kirkland partner Robert Khuzami will serve as a panelist. Click [here](#) for more information.

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Kirkland & Ellis' nearly 400 private equity attorneys have handled leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 400 private equity firms around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Private Equity Group of the Year" in 2012, 2013, 2014 and 2015 by *Law360* and was commended as being the most active private equity law firm of the last decade in *The PitchBook Decade Report*. Kirkland & Ellis was named "Law Firm of the Year" in Mergers and Acquisitions Law by U.S. News Media Group and Best Lawyers in their 2014 "Best Law Firms" rankings. The Firm was named "Best M&A Firm" at *World Finance's* 2014 Legal Awards, "Law Firm of the Year in North America: Fund Formation" at Private Equity International's 2013 Private Equity International Awards and "Private Equity Deal of the Year" at the 2014 IFLR Americas Awards.

In 2012, 2013, 2014 and 2015, Chambers and Partners ranked Kirkland as a Tier 1 law firm for Investment Funds in the United States, United Kingdom, Asia-Pacific and globally. The Firm was ranked as the #1 law firm for both Global and U.S. Buyouts by deal volume in Mergermarket's *League Tables of Legal Advisors to Global M&A for Full Year 2011, 2012, 2013, 2014 and 2015*, and has consistently received top rankings among law firms in Private Equity by The Legal 500, the Practical Law Company and IFLR, among others.

The Lawyer magazine has recognized Kirkland as one of its "Transatlantic Elite," having noted that the Firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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